claimant to show that there was in fact no grant.[14] The only difficulty in thus applying the doctrine as a true presumption, when the state is involved, is that for all other purposes it is treated as a conclusive rule of substantive law, and that it has become quite unnatural to regard it as anything else.[15]

MAY THE LEGISLATURE, WITHOUT JUDICIAL REVIEW, PREVENT A REFERENDUM BY DECLARING ITS ACT WITHIN THE EMERGENCY EXCEPTION? — The frequent conflict between the judicial and legislative branches of government has been interestingly presented by a series of cases in Washington, all involving the same question in slightly different phases.[1] A recent amendment to the Washington constitution provided that no bills should take effect for ninety days, thereby giving an opportunity for a referendum, but excepting bills for certain emergency purposes from the operation of this provision.[2] Can the legislature conclusively determine that a bill falls within this exception, or is its determination subject to judicial review? The Washington court exercised a power to review; other courts dealing with substantially similar provisions have differed as to the answer.[3]

Really two closely related questions are involved. Is it a political question to determine whether a bill properly falls within the exception? Was it the intent of the people to vest the ultimate power as to this exception in the legislature or in the judiciary? If it is a political

[14] See 2 GREENLEAF, EVIDENCE, 16 ed., § 539 *a*. Where the owner has only a future estate the trespasser gets no easement if he does not injure the *corpus* of the estate. Wheaton *v.* Maple & Co., L. R. (1893) 3 Ch. 48. On the same reasoning no prescriptive right to ancient lights has been recognized in this country since it would be absurd to argue that because a man does not build a wall against his neighbor's house he has no right to do so. Parker *v.* Foote, 19 Wend. (N. Y.) 308.

[15] See Reed *v.* Earnhart, 10 Ired. (N. C.) 516, 518, *supra* n. 3, where the court, while actually applying the presumption of a lost grant against the state, admits that it "is not based upon the idea that one actually issued, but because public policy and 'the quieting of titles' make it necessary to act upon that presumption." Likewise in Matthews *v.* Burton, 17 Gratt. (Va.) 312, 318, *supra*, where the state is involved, though the facts do not necessitate the presumptions being treated conclusively, the court says: "I think now we might go further and adopt this presumption as a conclusion of law, and engraft it as a canon of the law of real property." And again in Crooker *v.* Pendleton, 23 Me. 339, 342, *supra*, the court, though treating the presumption as a true one, is led into saying: "The presumption is bottomed upon the same principle as the statute of limitations and is analogous to it."

[1] State *ex rel.* Brislawn *v.* Meath, 147 Pac. 11; State *ex rel.* Blakeslee *v.* Clausen, 148 Pac. 28; State *ex rel.* Case *v.* Howell, 147 Pac. 1159; State *ex rel.* Case *v.* Howell, 147 Pac. 1162.

[2] WASH. CONST., Art. II, § 1 (*b*). "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, . . . "

[3] McClure *v.* Nye, 22 Cal. App. 248, 133 Pac. 1145. See Attorney-General *ex rel.* Barbour *v.* Lindsay, 178 Mich. 524, 145 N. W. 98, *accord*. Kadderly *v.* Portland, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; Bennett Trust Co. *v.* Sengstacken, 58 Ore. 333, 113 Pac. 863. *Contra*, State *ex rel.* Lavin *v.* Bacon, 14 S. D. 394, 85 N. W. 605. See also State *ex rel.* Arkansas Tax Commissioners *v.* Moore, 145 S. W. 199, 202, *contra*.

question, one of policy rather than law, then it is one which the legislature is best qualified to handle; it is outside the ordinary scope of the judiciary, and presumably was intended to be finally decided by the legislature.[4] So if the question in the principal case were merely one of urgency it would clearly be political;[5] but it involves more. It is rare to find a question which is entirely judicial or entirely political; there is no clearly defined line between the two. However desirable it may be, theoretically, to divide the question into its two elements, — leaving to the legislature the decision as to urgency and to the courts the interpretation of the clause to determine what bills fall within the exception,[6] — in practice the two elements are so intermingled that it is necessary to leave the whole ultimate decision to one body or the other. The problem is to balance the conflicting elements and determine into which class each question was intended to fall from its nature and surrounding circumstances; the court's opinion of the advisability of one view or the other should not affect the answer except in so far as it has a bearing on determining the intent of the constitutional amendment. It is true that the policy of legislation and its necessity are primarily political questions, and as such should ordinarily be left to the legislature in the absence of strong opposing considerations. Legislation apparently unnecessary on its face may be of immediate necessity because of facts unknown to the courts. In any case, review by the courts will somewhat hinder the freedom of legislative action. But nevertheless the Washington court seems right in holding this a judicial question. The purpose of the referendum amendment was to give to the voters a more effective control over legislation, and to limit the powers of the legislature to the fullest extent consistent with the safety of the state. The adoption of the amendment indicated a distrust of the legislature. It does not seem reasonable to suppose the emergency exception was to be so construed as to give the legislature the power to nullify the amendment;[7] but this is the effect of holding it a pure political question, for then there is no ground on which the court can interfere no matter how outrageous that decision may be. Without assuming that the legislature would deliberately abuse that power, the constant tendency would undoubtedly be toward an extension of the scope of the exception. The only check would be the accountability of the representatives at the polls, which the adoption of the referendum proves to have been deemed inadequate. But if the matter be held within the scope of judicial review, the natural tendency would be to construe narrowly this exception

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[4] See United States *v.* Realty Co., 163 U. S. 427, 444; Pacific State Telephone & Telegraph Co. *v.* Oregon, 223 U. S. 118, 142.

[5] See Day Co. *v.* State, 68 Tex. 526, 543, 4. S. W. 865, 872. Under the constitution certain formalities of enactment might be suspended if there was an emergency. The court refused to review the decision of the legislature that such an emergency existed.

[6] See the discussion of somewhat similar questions in regard to the police power, in Mugler *v.* Kansas, 123 U. S. 623, 661; Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 195; *In re* Morgan, 26 Col. 415, 424.

[7] "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained." Marbury *v.* Madison, 1 Cranch 137, 176.

to reserved power in the people, since both branches of the government would have to be satisfied that a given act falls within the exception. Moreover, the judicial review should not prove unduly restrictive, since the legislative body must be deemed to have acted constitutionally in all doubtful cases.[8] It may be presumed that the courts will act wisely and liberally here as they have done in the somewhat similar case of legislation under the police power; and that the purpose of the emergency clause will not be endangered. Whether even such restriction on the legislature is advisable or not is another matter; if it is not, that is a reason for attacking the referendum amendment, but not for indirectly weakening it by giving it an interpretation it was not meant to bear.

It is not possible to distinguish or discuss all the cases which present similar difficulties. But an excellent contrast is presented by the authorization given by Congress to the President to call out the militia whenever there shall be "imminent danger of invasion," the exercise of which power has been held not subject to review by the courts.[9] There it may become a question of national life or death, and immediate unhampered action may be imperative. The whole purpose of the power, and the efficiency of the militia, would be lost if each militiaman could demand a judicial review of the President's orders. Further, it is a power which need rarely be exercised, and opinion as to the necessity for its exercise would seldom differ widely. Surely this is very different from the situation in the principal cases, where the frequent exercise of a broad power might well lead to its extended use as a device for avoiding a referendum.

ENFORCEMENT BY INJUNCTION OF A STATUTORY RIGHT OF PERSONALITY. — A recent case in New York, which has attracted some popular interest, raises issues of much importance in the common-law system of legal and equitable rights and remedies. *Woollcott* v. *Shubert*, 154 N. Y. Supp. 643. A statute provides that discrimination between persons on the part of theater managers shall be a misdemeanor, and further provides for a penalty recoverable in a private action by the person so injured. Plaintiff, a dramatic critic who had been excluded on the ground that his reviews were unfair, sought relief by injunction. Relief was refused on the ground that equity had no jurisdiction, and that in any case the remedy provided was adequate.

The ground given by the court for denying its jurisdiction was that where a statute creates a new right, and gives a specific remedy, such remedy is exclusive. As a general rule of statutory construction, this cannot, it is submitted, be sustained on principle. It necessarily involves the conclusion that what the legislature intended was not to confer a right, and a corresponding remedy, but merely an alternative right at the option of the wrongdoer, — that is, a right to admission or to the

[8] Missouri, Kansas & Texas Ry. Co. *v.* May, 194 U. S. 267. See McClure *v.* Nye, 22 Cal. App. 248, 251, 133 Pac. 1145, 1147; Attorney-General *ex rel.* Barbour *v.* Lindsay, 178 Mich. 524, 540, 145 N. W. 98, 104.

[9] Martin *v.* Mott, 12 Wheat. (U. S.) 19.